No. 06-1196

In the Supreme Court of the United States

KHALED A.F. AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS AL ODAH, ET AL.

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INTRODUCTION

The government asks for a "bright-line" rule limiting the reach of habeas corpus to formally sovereign U.S. territory in the case of foreign nationals. Br. 25. Granting the government's plea would enable the creation of zones outside the protection of U.S. and foreign law where the Executive can do as it pleases with its captives, free from restraint or review to ensure fair process. Such unchecked Executive power is unprecedented, unsupported by case law and inconsistent with first principles of constitutional government.

The government claims that Guantánamo detainees "enjoy more procedural protections than any other captured enemy combatants in the history of warfare." Br. 9. However, until the enactment of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, alleged "enemy combatants" held within U.S. territorial jurisdiction were entitled to bring habeas actions challenging their detention. *Rasul* v. *Bush*, 542 U.S. 466 (2004). Now, the government claims, as a result of this legislation, it may hold these individuals indefinitely, if not permanently, and may do so on the basis of hearings (i) conducted years after capture and thousands of miles from the place of capture, (ii) by military tribunals directed to assume the truth of the government's allegations, in proceedings that (iii) do not afford them counsel or any meaningful opportunity to rebut the government's allegations, and that (iv) permit the tribunals to affirm their "enemy combatant" designations based on evidence that is secret, hearsay, and procured by torture. The tribunals' decisions are subject only to the limited judicial review provided by the DTA, and the decision to release a detainee is purely a matter of Executive grace.

After six years of stonewalling, it is time for the government to justify petitioners' detentions. If in proper habeas proceedings petitioners are determined to be properly detained, the government will prevail. If not, peti-

tioners should be released. Regardless of the outcome, habeas review in the district court is long overdue "to consider . . . the merits of petitioners' claims." *Rasul*, 542 U.S. at 485.

ARGUMENT

I. The Suspension Clause Applies In Guantánamo, A Land Under Exclusive U.S. Territorial Jurisdiction.

A. Under *Rasul*, habeas extends to places within exclusive U.S. territorial jurisdiction.

As this Court recognized in *Rasul*, habeas historically has extended to places within the exclusive territorial jurisdiction of the United States. 542 U.S. at 481-82. The question, therefore, is not whether the U.S. is formally sovereign in Guantánamo, see Br. 29, 35, but whether Guantánamo is territory over which the U.S. has "complete jurisdiction and control," *Rasul*, 542 U.S. at 480-81.

The government seeks a "bright-line" test based on formal sovereignty (which itself is an amorphous concept). Br. 25. But a significant concern in the cases cited by the government was whether applying U.S. law might conflict with local law or custom. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990); *id.* at 277-78 (Kennedy, J., concurring); *United States* v. *Spelar*, 338 U.S. 217, 221 (1949).[1] A test based on formal sovereignty

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[1] *Spelar* and *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), do not support the proposition that the U.S. is not sovereign in Guantánamo. In *Vermilya-Brown*, the Court held that the Fair Labor Standards Act applied to leased territory in the Crown Colony of Bermuda. The Court simply assumed, without deciding, that the territory remained under the sovereignty of the United Kingdom. See 335 U.S. at 380 (proceeding on the "postulate" that U.S. lacked sovereignty). In *Spelar*, the Court, proceeding on the same assumption, addressed the application

(footnote cont'd)

not only is arbitrary but would allow the Executive to create and perpetuate "law-free" zones – legal black holes – in places like Guantánamo. By contrast, recognizing habeas jurisdiction in places under exclusive U.S. territorial jurisdiction and law would prevent the creation of such zones while also avoiding conflicts with foreign law.

"From a practical perspective," Guantánamo "belongs to the United States," *Rasul*, 542 U.S. at 477 (Kennedy, J., concurring in the judgment), not simply because the U.S. has exclusive possession and control, see Br. 24-25, but because U.S. law is the only law that can apply. Guantánamo is not subject to the laws of any other country, and it is not subject to an occupation government under the law of war. The Guantánamo detainees have been removed from the sovereign territory of any other country whose laws could protect them. With only U.S. law available, "[w]ho can judge but this court?" *Rex* v. *Cowle*, 97 Eng. Rep. 587, 599 (K.B. 1759).

The government cites *Rex* v. *Earl of Crewe*, [1910] 2 K.B. 576 (Eng.), in which the King's Bench denied a writ of habeas corpus to a Bechuanaland national detained pursuant to a special order issued by the High Commissioner in Britain's Bechuanaland Protectorate under authority conferred by legislation. Br. 31. The government's reliance on *Crewe* is misplaced. The King's Bench did not base its decision on the proposition that habeas does not

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of foreign law as a basis for liability against the U.S. under the Federal Tort Claims Act. See 338 U.S. at 221. Both cases involved leases that, unlike the Guantánamo lease, generally left foreign law in effect within the leased territories. See *Vermilya-Brown*, 335 U.S. at 382 n.4; *Spelar*, 338 U.S. at 218. Neither case involved a leased territory like Guantánamo, in which U.S. law is the only governing law.

extend outside of sovereign territory.[2] Rather, the court based its decision on the merits that English law, unlike the U.S. Constitution, allowed the legislature to establish a law-free zone. As Lord Judge Farwell observed, "I fail to see how any Court can say that the Legislature . . . has not jurisdiction to set up a despotism in any of the dominions of the Crown, or, indeed, in the United Kingdom itself . . . ." *Creuse*, 2 K.B. at 616. Under the U.S. Constitution, there is no authority for the United States to set up a "despotism" in any territory under its exclusive jurisdiction. The Suspension Clause is designed to prevent just that.[3]

B. Guantánamo is within exclusive U.S. territorial jurisdiction.

The U.S. does not have merely *de facto* jurisdiction over Guantánamo, as the government implies. See Br. 23, 25, 29. The jurisdiction exercised by the U.S. is *de jure* and exclusive under the Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, T.S. No. 418 (Feb. 23, 1903) ("Lease"). As exclusive jurisdiction is the most that is required for habeas jurisdiction, the question of whether Guantánamo is sovereign U.S. territory need not be ad-

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[2] "[T]he mere fact of the country not having been annexed, and being extra-territorial, would not prevent the issue . . . of a writ of habeas corpus to run in a country governed by a system of laws created under the powers of [an Act of Parliament]." *Creuse*, 2 K.B. at 608 (op. of Williams, L.J.).

[3] The government asserts (Br. 15) that the Suspension Clause is limited to formally sovereign U.S. territory because only in such territory, the government argues, could "rebellion or invasion" occur. The government's premise is incorrect. The Clause permits suspension in cases of "rebellion or invasion" because such events are likely to disrupt the government's ability to maintain order and adjudicate crimes. Such events are possible anywhere within U.S. territorial jurisdiction.

dressed.[1] Any limits on the power of the U.S. to cede Guantánamo or offer it independence, or to conduct activities not authorized by the Lease, are irrelevant to the availability of habeas to individuals imprisoned there because formal sovereignty is not the key.

The parties have cited many U.S. and historical cases on the question of the territorial reach of habeas corpus and the Constitution. In the end, however, whether Guantánamo is more like Mexico (*Verdugo*), occupied Germany (*Eisentrager*), the Channel Islands (*Overton*), or Berwick upon Tweed (*Coule*), is beside the point. The government has failed to articulate any rationale for a test based on formal sovereignty. The reach of habeas corpus to territories within exclusive U.S. jurisdiction is consistent with all of the case law and with the imperative of preventing the creation of law-free zones.

U.S. control over Landsberg Prison in occupied Germany following World War II was entirely different from the exclusive, *de jure* territorial jurisdiction exercised by the U.S. over Guantánamo today. The *Eisentrager* petitioners were held in territory only temporarily under the control of an occupation government, an exigent form of government justified by the law of war. *Johnson* v. *Eisen-*

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[1] The government does not address petitioners' argument that Cuba's sovereignty is qualified by the use of the term "ultimate." See Al Odah Br. at 19 n.18. The government also does not address the implications of the reference to the Lease in the 1912 amendment as a "cession," or the government's own description of Guantánamo as a "territory for which the U.S. is internationally responsible." See *id.* at 16-17. The Lease, moreover, provides that the U.S. may exercise the power of eminent domain. Art. III, Al Odah Br. a9. That power is "an attribute of sovereignty." *Miss. & Rum River Boom Co.* v. *Patterson*, 98 U.S. 403, 406 (1878), and is "inseparable from sovereignty." *United States* v. *Carmack*, 329 U.S. 230, 238 (1946).

trager, 339 U.S. 763, 784 (1950). Moreover, unlike the military commissions in *Eisentrager*, CSRTs are not contemplated or governed by international law and are not sufficient under international or U.S. law to justify detention without meaningful judicial review in territory under the exclusive, and effectively permanent jurisdiction of the United States.

Verdugo likewise does not establish a bright-line test based on sovereignty. Rather, its holding was based on the practical concern of conflict with foreign law governing the reasonableness of a search by U.S. agents in Mexico. See *Verdugo-Urquidez*, 494 U.S. at 273-75. Petitioners, on the other hand, are within the territorial jurisdiction of U.S. and are therefore not "without presence or property in the United States." Br. 8. *In re Yamashita*, 327 U.S. 1 (1946), *Sommersett* v. *Stewart*, 20 How. St. Tr. 1, 79-82 (K.B. 1772), and *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810), all demonstrate that voluntary presence in the country is not a prerequisite for habeas jurisdiction, even for foreign nationals.[5]

In re Ning Yi-Ching, 56 T.L.R. 3 (Vacation Ct. 1939) (Eng.), cited by the government, Br. 32, is also inapposite. That case involved a habeas action brought on behalf of Chinese nationals held by British authorities in Tientsin, a territory in China where the British held some administrative jurisdiction over their own citizens, but had no authority under the treaty to try Chinese nationals. See 56 T.L.R. at 5. At the time, Chinese nationals were under the jurisdiction of the Chinese courts, which in turn were under the control of the Japanese occupation government.

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[5] The government faults petitioners for not addressing principles of *stare decisis*, but the government misunderstands petitioners' arguments. *Eisentrager* has no application to Guantánamo, and this Court need not decide whether to overrule it in this case. See *Rasul*, 542 U.S. at 475-76.

See *id.* Unlike U.S. jurisdiction in Guantánamo, British jurisdiction in Tientsin was not exclusive, and the administration of justice over foreign nationals resided in the courts of the foreign sovereign. See *id.*

In short, the government has cited no case in which a foreign national detained within the exclusive territorial jurisdiction of the government was denied habeas corpus solely because the detention was outside formally sovereign territory. Such a rule would shred the principles of justice and the system of checks and balances that define our constitutional order.

C. The question is not whether prisoners of war may be detained, but whether petitioners are prisoners of war.

The government claims that habeas jurisdiction does not extend to prisoners of war. That claim begs the question presented here: Whether petitioners have a right to a habeas hearing to determine whether they *are* prisoners of war. Before a person may be held as a prisoner of war ineligible for habeas, the government must first properly establish that the person *is* a prisoner of war. *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion); *id.* at 549-50 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). In other settings – as when a captive wears the uniform or bears the insignia of a foreign foe – an elaborate hearing is not needed to determine whether the captive is a prisoner of war. Here, petitioners have alleged that they are *not* prisoners of war or alien enemies, and it is not self-evident that they are. Petitioners are entitled to a habeas proceeding to contest the allegations against them, and the Suspension Clause precludes Congress or

the Executive from stripping the courts of jurisdiction to decide that question.[6]

The government wants to have it both ways, claiming its rights under the law of war while avoiding its obligations. Either the detainees are prisoners of war, entitled to the protections of the law of war, or they are civilians, entitled to be released unless some other basis for continued detention can be established. See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866). Whichever result obtains, the question is within the province of the courts. In *Milligan*, for example, which the government simply ignores, the Court rejected the government's assertion that the petitioner was a prisoner of war not entitled to habeas corpus and made clear that only a person subject to the law of war can be held without trial. "If he cannot enjoy the immunities attaching to the character of a prisoner of

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[6] The government argues that the Guantánamo detainees are alien enemies. Br. 26, 45, 72. But alien enemies by definition are citizens of enemy states, and the Guantánamo detainees are nationals of U.S. allies. See 50 U.S.C. § 21. See also *Ludecke* v. *Watkins*, 335 U.S. 160, 172 n.17 (1948) (The question "as to whether the person restrained is in fact an alien enemy . . . may also be reviewed by the courts."). *Vaughan's Case*, 91 Eng. Rep. 535 (K.B. 1689), cited by the government, Br. 13 n.15, does not stand for the proposition that nationals of neutral countries who associate themselves with the enemy thereby become alien enemies subject to detention without trial. That case merely held that a citizen of an ally of the United Kingdom may be tried for treason for adhering to the King's enemies. The prisoner was given the right to a trial by jury to decide the truth of the allegations against him. *Miller* v. *United States*, 78 U.S. (11 Wall.) 268 (1871), also cited by the government, Br. 63, 65, involved seizure of enemy property, and is even further off point.

war, how can he be subject to their pains and penalties?" See *id.*[7]

Contrary to the government's suggestion, Br. 44-47, courts affirming the detention of prisoners of war historically have not simply deferred to the government's declaration that the petitioners were prisoners of war. In *The King* v. *Schiever*, 97 Eng. Rep. 551 (K.B. 1759), for example, the King's Bench found on the petitioner's own affidavit that he was lawfully detained as a prisoner of war, having served aboard a French privateer. Likewise, in *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779), the court acknowledged its power to issue a writ of habeas corpus to inquire into the lawfulness of the detention of an alien, but found on the petitioners' own allegations that they were both prisoners of war and alien enemies. In *Lockington's Case*, Brightly 269 (Pa. 1813), also, the court did not deny the writ because the petitioner was held as an alien enemy, but on the merits because he was shown actually to be an alien enemy subject to detention under the Alien Enemy Act.

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[7] The government cites *The King* v. *Superintendent of Vine St. Police Station*, [1916] 1 K.B. 268 (Eng.), for the proposition that any person seized during warlike operations is a prisoner of war subject to detention. Br. 37-38. *Vine Street*, however, merely held that detention of an alien enemy is lawful, and it has no application to nationals of an allied country. *Vine St.*, 1 K.B. at 276 (Op. of Bailhache, J.) ("I desire with all the emphasis I can command to state expressly that I am not dealing with the case of British subjects or with aliens the subjects of neutral countries, and I trust that nothing in this judgment will be considered as having any bearing whatever upon any class of person other than alien enemies"). The court preserved the right of the petitioner to contest his status as an alien enemy. *Id.* at 277 (Op. of Low, J.) ("The first question we have to determine is whether the applicant is an alien enemy.").

D. The Suspension Clause is an enforceable restraint on Congress' power and does not depend on personal rights.

Only in a footnote does the government address petitioners' argument that the Suspension Clause is an enforceable restraint on the power of Congress to deprive the Judiciary of its power to review the legality of the detentions of those in federal custody. See Br. 14 n.4. The government argues that the reference to the "privilege" of the writ of habeas corpus signifies that habeas is analogous to rights described in the Bill of Rights. But the reference in the Suspension Clause to the "privilege" of the writ of habeas corpus presupposes the existence of the power to issue the writ. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); *INS* v. *St. Cyr*, 533 U.S. 289, 304 n.24 (2001) ("the Clause was intended to preclude any possibility that 'the privilege itself would be lost' by either the action or inaction of Congress"). This Court has held in case after case, starting with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that any statute contrary to the Constitution is void. A constitutional violation need not be predicated on the existence of a personal right. Al Odah Br. 23-24.

The Suspension Clause also is fundamental to the separation of powers. In the DTA and MCA, Congress has conferred on the Executive the power to deprive the courts of habeas jurisdiction by unilaterally designating a person as an "enemy combatant." The jurisdiction of the courts under the DTA and MCA turns on that Executive determination alone, and the Executive thus holds the keys to the courthouse door. The potential for abuse of such power is the very reason that the Founders saw fit to prohibit the suspension of habeas corpus except in cases of rebellion or invasion when the public safety requires it.

II. The CSRT And DTA Are Not An Adequate Or Effective Substitute For Habeas Corpus.

A. The CSRT and DTA regime was not intended to substitute for habeas corpus.

The government argues that the CSRTs and DTA review are an adequate substitute for habeas corpus. But the government argued in the D.C. Circuit that the DTA was *intended* to "displace traditional habeas review." See Resp't's Pet. for Reh'g and Suggestion for Reh'g En Banc, *Bismullah* v. *Gates*, Nos. 06-1197 & 1397, at 10 (D.C. Cir. filed Sept. 7, 2007). The DTA, moreover, does not address the legality of detention or afford the remedy available by writ of habeas corpus – release. Indeed, the *Bismullah* panel has indicated that there is no limitation on the government's power to re-do CSRTs until it gets the result it wants, regardless of any deficiencies in their procedures. See *Bismullah* v. *Gates*, --- F.3d ---, 2007 WL 2851702, at *3 & n.5 (D.C. Cir. 2007) (denial of panel rehearing). The government argues that it has released every detainee determined by a CSRT not to be an enemy combatant, Br. 60, but the releases – and the determinations of combatant status – were purely a matter of Executive grace. No Guantánamo detainee has ever been released as a result of any judicial process.[8]

The government argues that habeas review "requires deference to any military tribunal" (Br. 45), but the cases it cites are inapposite. All of them address habeas review

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[8] The government's assertion that it has released every detainee determined not to be an enemy combatant by a CSRT is also incomplete. Many detainees who were determined not to be enemy combatants were not released, but were subjected to subsequent CSRTs, sometimes multiple times, until they were determined to be enemy combatants. See Al Odah Br. at 5 n.6; see also *Bismullah*, 2007 WL 2851702, at *3 & n.5.

of criminal convictions in military trials where substantial due process had already been afforded. See *In re Yamashita*, 327 U.S. 1; *Ex parte Quirin*, 317 U.S. 1 (1942); *Hiatt* v. *Brown*, 339 U.S. 103 (1950); *In re Grimley*, 137 U.S. 147 (1890); *Burns* v. *Wilson*, 346 U.S. 137 (1953). For example, the petitioner in *Yamashita*, the commanding general of Japanese forces in the Philippines during World War II, was indisputably an enemy alien and an enemy combatant. See 327 U.S. at 15-16, 20. He was tried and convicted by a military commission, a type of court authorized by the law of war and recognized by the Articles of War, applying standards generally equivalent to courts-martial practices in place at the time. See *id.* at 13-14. He was allowed to see and rebut the evidence against him, to examine witnesses (two-hundred-and-eighty-six of them), and to have assistance of counsel (six attorneys). See *id.* at 5, 7. His trial lasted for over a month. Even after all of that process, this Court carefully analyzed the legal issues involved, including issues of international law, deferring to the trial court only as to factual findings, as it typically does in criminal cases. See *id.* at 23.

Likewise, in *Quirin*, this Court addressed criminal convictions of German saboteurs who were tried before a properly constituted military commission. This Court's review of the military commission proceedings in *Quirin* and *Yamashita* was consistent with its deferential review of criminal convictions where the accused has already received a full and fair trial before a court. See, e.g., *Herrera* v. *Collins*, 506 U.S. 390 (1993).

Conversely, the Guantánamo detainees are not enemy aliens, and they deny that they are enemy combatants.[3]

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[3] Indeed, the detainees include individauls captured in Azerbaijan, Bosnia, Egypt, the Gambia, Georgia, Indonesia, Iran, Kenya, Mauritania, Mexico, Somalia, Thailand, Turkey, United Arab Emirates, and Zambia.

They have had no opportunity to see or rebut the principal evidence against them, which is classified. The government has not called a single witness at a CSRT hearing, so the Guantánamo detainees have not had the opportunity to examine the witnesses against them. Nor did they have the assistance of counsel. Not one of the petitioners has been convicted or even charged with any crime. The CSRT procedures employed are entitled to no deference at all.[10]

The government quotes *St. Cyr*, 533 U.S. 289, for the proposition that "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive." Br. 47 (quoting *St. Cyr*, 533 U.S. at 306). The government's selective use of language obscures the fact that the Court in *St. Cyr* was referring to deportation orders, not detention orders. See 533 U.S. at 305-06.

This Court has never approved a departure from habeas corpus as substantial as the DTA. In *Hill* v. *United States*, 368 U.S. 424 (1962), this Court approved a substitute that was "exactly commensurate" with habeas. See *Hill*, 368 U.S. at 427; see also *Swain* v. *Pressley*, 430 U.S. 372, 382 (1977). If the Court were to approve of the CSRTs and DTA review as a substitute for habeas, it would be difficult to imagine any process within the con-

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[10] *Burns* v. *Wilson*, *Hiatt* v. *Brown*, and *In re Grimley*, cited by the government (Br. 44-45), all involved habeas review of sentences of confinement following trial by court-martial, and reflect only the unremarkable propositions that (i) courts-martial, as courts of the United States, are entitled to deference in factual findings, and (ii) a habeas court is limited "to determin[ing] whether the military have given fair consideration to each of [the petitioner's] claims." *Burns*, 346 U.S. at 144 (plurality opinion). Petitioners, on the other hand, have received no factual hearing before any court of the United States.

trol of the Executive, or any rudimentary standard of judicial review, that would not pass as an adequate substitute. The door would be open for future administrations to chip away or even eliminate the historic protection of liberty under law. As this Court has recognized:

> This nation . . . has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.

Milligan, 71 U.S. at 125.

B. After nearly six years in prison, petitioners need not "exhaust" other remedies.

Petitioners in *Al Odah* have tried since May 2002 to have their cases heard in court. They have been to this Court in *Rasul*, and they prevailed in the district court on the government's motion to dismiss. Their habeas cases were pending on the government's interlocutory appeal to the D.C. Circuit when Congress enacted the DTA and MCA. The government now argues for even further delay, claiming that petitioners must exhaust their remedies under the DTA – remedies that did not even exist for the first four years of their detention and that do not contemplate the availability of a judicial order requiring release. All of the petitioners have had DTA petitions pending for at least four months. Other detainees have had DTA petitions pending since January 2006 – nearly two years – and the D.C. Circuit has ruled only on preliminary procedural motions. See *Bismullah* v. *Gates*, 501 F.3d 178 (D.C. Cir. 2007). The government has sought rehearing of that decision *en banc* and has indicated that it may even seek to appeal to this Court. Br. 59 n.31.

Furthermore, in denying rehearing, the *Bismullah* panel concluded that the government can avoid review of defects in the initial CSRTs, including the government's failure to collect and maintain required evidence relating to the detainees' designations as enemy combatants, simply by re-doing the CSRTs, potentially under a new set of rules, and with an even more limited record, at the government's sole discretion. See *supra* at 11. The government has indicated that it is considering conducting new CSRTs in multiple DTA cases, which will lead to considerable further delay. See Resp't's Mot. To Stay Order To File Revised Certified Index of Record as Defined in *Bismullah* and To Stay Briefing Schedule, *Chaman* v. *Gates*, No. 07-1101, at 8 (D.C. Cir. filed Oct. 11, 2007).

Exhaustion of remedies is a prudential requirement, not a jurisdictional requirement. See *Dretke* v. *Haley*, 541 U.S. 386, 392-93 (2004). Even if petitioners were required to exhaust their remedies under the DTA, the correct action for this Court to take would be to reverse and remand the D.C. Circuit's decision with instructions to stay the petitions until petitioners' DTA review is complete. See *Gusik* v. *Schilder*, 340 U.S. 128, 134 (1950). But petitioners are not required to exhaust their DTA remedies. The CSRTs are beyond repair, and DTA review is inadequate and ineffective. There is no requirement to exhaust an inadequate remedy. *Wilwording* v. *Swenson*, 404 U.S. 249, 250 (1971); see also *Boumediene* v. *Bush*, 127 S. Ct. 1480, 1480-81 (2006) (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting from denial of certiorari).

III. Petitioners' Detention Is Unlawful.

The court of appeals erroneously dismissed petitioners' habeas cases for lack of jurisdiction without reaching the question on which it had granted interlocutory review. The government argues that this Court should not reach the merits of this case either but should remand to the D.C. Circuit if the Court finds that jurisdiction exists. The Court should decline the government's invitation for fur-

ther delay. Such a ruling would put this case right back to where it was three years ago after this Court decided *Rasul*, and would virtually guarantee at least another year before petitioners could even commence review of their detentions in the district court. The D.C. Circuit has already decided, erroneously, that detainees in Guantánamo do not have constitutional rights, and this Court has the benefit of the D.C. Circuit's treatment of that issue. The merits of the case are encompassed within the questions presented on which this Court granted certiorari, and have been fully briefed. They are ripe for decision. This Court should reverse and remand for prompt habeas corpus hearings in the district court.

A. Due Process entitles petitioners to habeas review of the lawfulness of their detention.

Even if the detainees had no rights under the Due Process Clause of the Constitution, as the government argues, habeas corpus would still afford them a plenary review of the lawfulness of their detentions. Only a detention justified by domestic or international law can survive habeas review. Al Odah Br. 23-24, 40.

But petitioners are also entitled to habeas review of their detention as a matter of due process. See *Rasul*, 542 U.S. at 483 n.15 ("Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws and treaties of the United States."). The government contends that footnote 15 did not recognize that the petitioners have constitutional rights, Br. 68-69, but footnote 15 was necessary to overcome the D.C. Circuit's alternative rationale in *Al Odah* v. *United States*, 321 F.3d 1134 (D.C. Cir. 2003), for affirming the district court's dismissal of petitioners' habeas actions: that the detainees had no rights protected by the Constitution or laws of the United States, *id.* at 1134. The government suggested that the Court could not reverse the D.C. Circuit without rejecting that alternative rationale. See Br. for Resp'ts.

Rasul v. *Bush*, Nos. 03-334 & 343, at 11, 16-17, 19-20. That is exactly what footnote 15 accomplished.

B. The AUMF does not authorize detentions beyond those allowed by the law of war.

The Authorization for Use of Military Force ("AUMF") does not authorize detentions that are unsupported by the law of war. See *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2775 (2006). Indeed, the AUMF references the War Powers Act, which incorporates the United States' treaty obligations under the law of war. AUMF § 2(b). Any "inherent" constitutional authority the Executive may have to detain prisoners is likewise bound by the law of war. See *Milligan*, 71 U.S. at 131; cf. *Hamdan*, 126 S. Ct. at 2774-75.

This Court has made clear that civilians who are not associated with the military arm of an enemy government are not subject to detention under the law of war, even if they have committed hostile acts. *Milligan*, 71 U.S. at 131; *Quirin*, 317 U.S. at 45. As this Court held in *Milligan*, only alien enemies and those who are proven to have directly supported the military arm of a hostile government may be subject to military detention under the law of war. All others must be released or criminally charged, at least when they are detained within exclusive U.S. territorial jurisdiction.

CONCLUSION

The Court should reverse the court of appeals' decision and remand with instructions that the district court conduct expedited proceedings "to consider . . . the merits of petitioners' claims." *Rasul*, 542 U.S. at 485.

Respectfully submitted,

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